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No. 696

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

HARRY H. DRILL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, WASHINGTON, D. C.

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This Petitioner, Harry H. Drill, Attorney Pro Se, prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Claims (R. 203) entered June 22, 1962, (Appendix B), and the Order overruling and denying his "Motion For Relief From The Order of June 22, 1962," (R. 267), such motion for rehearing, reversal, amendment, modification, and for other relief having been timely filed on July 17, 1962, per Court of Claims Rule 53 (a), (c) and denied and overruled October 3, 1962, appearing in the Record at (R. 204-245).

OPINIONS BELOW

The Court of Claims dismissed the complaint-Petition No. 22-62 (R. 1-187) on June 22, 1962, without opinion, and on October 3, 1962, overruled and denied (R. 267) Petitioner's motion for rehearing also without opinion.

This case has not been reported. These Orders are set forth, infra, Appendix B.

JURISDICTION

The jurisdiction of this Court for certiorari is invoked under Section 1255 of Title 28, U.S.C.A., and Supreme Court Rule 22 (3).

QUESTIONS PRESENTED

The questions forming the basis for the petition for certiorari are as follows:

1. Whether Petition No. 22-62 alleges any right, subject matter, jurisdiction, or seeks any relief beyond the jurisdiction of the Court of Claims.

2. Whether these claims for monetary damages against the United States alleged to have proximately resulted from its ILLEGAL DENIAL to Petitioner of its public employment and/or Petitioner's right to compete with others for positions in its public employ, present justiciable and/or proper causes of action if alleged to be "founded" upon the Constitution of the United States and Acts of Congress and Executive Department Regulations and upon contract, express or implied.

3. Whether these claims for monetary damages against the United States, alleged to have proximately resulted from its imposition of "pains, penalties, and punishment in the nature of attainder and/or ex post facto law" upon Petitioner by its Executive Branch and Departments present justiciable and/or proper causes of action as "founded" upon and/or as a violation of Article 1, Section 9, Clause 3 of the United States Constitution.

4. Whether these claims for monetary damages, alleged to have been sustained by Petitioner because the Executive Branch of the United States debarred and proscribed him permanently, temporarily, totally, or to a li-

mited extent as to certain positions of federal employment and/or preference to compete for same *without a hearing of any kind*, present justiciable and/or proper causes of action as "founded" upon and/or as a violation of the 5th Amendment of the Constitution.

5. Whether these claims for monetary damages against the United States, alleged to have proximately resulted because its Executive Branch arbitrarily, capriciously, without a hearing of any kind, and without exercise of "administrative judgment", but by substitution of fiat and "Will", disqualified Petitioner to receive and/or denied to and deprived him of his "Preference Eligibility", rights, and benefits provided for his use by the Congress in the Veterans' Preference Act of 1944, as amended, present justiciable and/or proper causes of action as "founded" upon and/or as a violation of an Act of Congress.

6. Whether claims for monetary damages against the United States, alleged to have proximately resulted because its Executive Branch repudiated and breached an alleged contract *to employ* and/or *to reemploy/re-appoint* Petitioner, present justiciable controversy and/or proper causes of action as founded upon and/or as a violation of a contract, express or implied.

7. Whether the United States C of Claims accepted and took jurisdiction over these claims *before* it decided non-jurisdictional issues of law (as it must), or whether it decided non-jurisdictional issues of law *without* taking jurisdiction (as it must not), or whether it took jurisdiction over the subject matter, decided issues that pertain to the *merits* of the Petition, and thereafter repudiantes its jurisdiction over any subject matter *after* it decided such non-jurisdictional issues of law.

8. Whether the Court of Claims dismissed the Petition for "lack of jurisdiction" as to any subject matter of these claims; whether any "subject matter" of the Petition is "beyond the *jurisdiction* of the Court; whether any remedial relief sought in the Prayer For Relief (a matter

for the discretion of the court) raised any jurisdictional issue and/or *ousted* the Court from its regular jurisdiction and/or whether the Court dismissed the Petition solely because it considered a request for one discretionary remedial objective, not jurisdictional and not a claim of right, to be a fatal defect.

9. Whether, and if having specifically claimed and alleged the regular jurisdiction of the Court of Claims as provided in 28, U.S.C.A., Section 1491 in an appropriate pleading, and if Petitioner has neither claimed nor alleged any other *jurisdiction*, has the Court nevertheless dismissed this Petition for "lack of jurisdiction over any subject matter" *after* it exercised jurisdiction over the subject matter by deciding the issues of law and merits that the claims and causes of action are not justiciable or proper causes of action?

10. Whether the Court erred by permitting Respondent to present by "Motion To Dismiss" inconsistent and contradictory defenses - "lack of jurisdiction over the subject matter" of Petition 22-62 - while simultaneously requesting the Court to take and exercise jurisdiction over the subject matter to decide the issues of law that the Petition "fails to state a claim upon which relief can be granted", such defenses not being pleaded in the alternative and/or authorized by Rule 16(b) of the Court of Claims Rules.

11. Whether and if the Respondent, by its "Motion To Dismiss", raised matters *outside* of the Petition (not manifest in the Petition) and which were NOT excluded by the Court but which were included by the Court and considered by the Court, then whether Respondent's "Motion To Dismiss" should have been treated as a "Motion For Summary Judgment" per Court of Claims Rule 16(b), denied as a "Motion For Summary Judgment", and Petitioner permitted to file a cross-motion for Judgment On the Pleadings and/or For Summary Judgment per such Rule and be heard thereupon.

12. Whether the Court of Claims, a federal court, may, as to an "appropriate pleading claiming its regular jurisdiction" and no other jurisdiction, "declare" that Petitioner in the past has been deprived of his "Preference Eligibility" arbitrarily and without lawful cause, has suffered imposition of "pains, penalties, and punishment in the nature of attainder and/or ex post facto law" in violation of his immunities therefrom guaranteed by Article 1, Sec. 9, Clause 3 of the United States Constitution, was illegally disqualified from both public employment and reemployment; that Henry L. Scott, a non-veteran, and other non-veterans neither were equally nor more entitled to preference than Petitioner but were in fact preferred to Petitioner in violation of Petitioner's rights to the benefits provided for him by the Veterans' Preference Act of 1944, and/or further "declare" so as to remove "stigma" from the Petitioner resultant from Respondent's violations of Petitioner's claimed rights.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves U.S. Constitution Article 1, Section 9, Clause 3 and the 5th Amendment thereof, the Veterans' Preference Act of 1944, as amended, Sections 851 through 869, of Title 5, U.S.C.A., (58 Stat. 387); and Rules of the Court of Claims. These Constitutional provisions, statutes, and rules are set forth in pertinent part in Appendix A, infra, p. 1 et seq.

This case also involves numerous regulations of the Executive Department, particularly 5, C.F.R., Parts 2, Sections 2.101 through 2.504, and 21, Sections 21.1 through 21.11. Petitioner indicates and alleges in detail (R.46-56) the sub-sections of these regulations that are void as violative of the Constitution, the Veterans' Preference Act, and other Regulations that restrict the Executive Branch in employment matters. However, owing to the voluminous character of such Regulations, Petitioner has not set them forth in the Appendix. Petitioner has

omitted to do so for the further reason that if these claims for monetary damages "founded" upon the Constitution, Acts of Congress, and upon contract are not justiciable or proper within the jurisdiction of the Court of Claims, then certainly claims "founded" upon executive department regulations would not be justiciable or proper either, and the setting forth of such regulations would be immaterial to the determination by this Court as to whether certiorari should issue.

STATEMENT OF THE CASE

1. THE PETITION, 22-62:

This action for monetary damages is brought by Petitioner, an attorney, representing himself as "Attorney Pro Se". Petitioner sets forth in his sworn and verified Petition No. 22-62, filed in the United States Court of Claims, Washington, D.C., on January 22, 1962, multiple causes of action for monetary damages and seeks an accounting therefor. Specifically, Petitioner alleges (R. 1-184) four (4) causes of action in each of Counts 1; 3; 5; 7; 9; 11; and 13, viz: (1) a claim "founded" upon Article 1, Section 9, Clause 3 of the United States Constitution; (2) a claim "founded" upon the 5th Amendment of the Constitution; (3) a claim "founded" upon the Veterans' Preference Act; and (4) a claim "founded" upon regulations of an executive department. Additionally, Petitioner claims on a cause of action "founded" upon contract to employ and/or to reemploy him in Respondent's public service, setting forth same in each of Counts 2; 4; 6; 8; 10; 12; and 14.

The Court's dismissal of Petition 22-62 setting forth these multiple causes of action and Counts by granting Respondent's "Motion To Dismiss", filed February 21, 1962, raises the twelve (12) "Questions Presented", supra, for review herein, and whether any ONE of the causes alleged is justiciable and proper within the Court's jurisdiction.

None of these multiple causes of action seek declaratory judgment nor injuction relief, a matter of significant importance and almost wholly determinative of the issues raised for review.

Since Petitioner's claim to and allegation of the *jurisdiction* of the Court of Claim is basic to all issues raised, supra, Petitioner exactly quotes his claim and allegation of the Court's jurisdiction set forth (R. 1) of his Count 1, viz:

> "1. That Plaintiff's Count 1 is founded upon the Constitution of the United States, Article 1, Section 9, Clause 3, and the Fifth (5th) Amendment thereof; additionally founded upon the Acts of Congress known as the Veterans' Preference Act of 1944, as amended, Sections 851 through 869 of Title 5, U.S.C.A., and the Civil Service Act, title 5, U.S.C.A. Chapters twelve (12) and thirteen (13) thereof; further and additionally founded upon Regulations of an Executive Department *and as hereinafter indicated and alleged in these premises: and that jurisdiction over this count is conferred by Title 28, U.S.C.A., Section 1491;"* (Italics supplied) (See Appendix 1a et seq for 28, US.C.A. Section 1491.)

By appropriate incorporating allegations and reference, (R. 80); (R. 87); (R. 94); (R. 99); (R. 109); (R. 112); (R. 126); (R. 130); (R. 137); (R. 141); (R. 159); (R. 163); and (R. 180), Petitioner incorporated the above quoted jurisdictional paragraph into each of his subsequent Counts and additionally alleges in Counts 2; 4; 6; 8; 10; and 12 that such Counts are "founded" upon Contract. By reason of such allegations and incorporating allegations, Petitioner claims the regular *jurisdiction* of the Court of Claims specifically, and he makes no other, different, or modification of his claim to jurisdiction (R. 1-184) neither in his petition proper nor its "Prayer For Relief" (R. 184-187). Moreover, such allegations effec-

tively introduce each of the four (4) causes of action into each of his Counts as stated, supra.

Only summarizing here, Petitioner, by his paragraphs subsequent to his jurisdictional claim quoted above, and (R. 2-184) proceeded to carefully allege, as required for appropriate pleading, (1) his primary rights; (2) the correlative duties and obligations of the Respondet; (3) the facts giving rise to the primary rgihts claimed; (4) the facts constituting the violations of Petitioner's rights by the Respondent; (5) the rules of law from which both the primary rights of Petitioner and the duties of the Defendant spring; and (6) monetary damages (R. 78 - likewise incorporated into each count by proper allegations of reference) ascertainable by accounting demanded. Further summarizing, the Petition, following these six (6) essentials to appropriate pleading, sets forth the material facts (R. 1-184) in detail that Respondent (a) illegally denied its public employment to Petitioner, a citizen of the United States; (b) debarred and proscribed him from its public employ and REEMPLOYMENT and also his right of liberty to compete with other citizens for both employment and "reappointment-reemployment"; (c) imposed and inflicted "pains, pnishment, and penalties in the nature of attainder and/or ex post facto law" upon him and/or Attainder and/or Ex Post Facto Law in violation of Atricle 1, Sec. 9, Clause 3 of the Constitution; (d) deprived him of rights of liberty without "due process of law" in violation of the 5th Amendment of the Constitution; (e) arbitrarily, capriciously, and without excercise of "administrative judgment", but by substitution of "Will" and fiat, disqualified him to receive, denied, and deprived him of the rights and benefits granted to him and provided for his use in the Veterans' Preference Act of 1944, as amended; and (f) that Respondent committed each of the violations of Petitioner's claimed primary rights indicated, supra, *without any judicial or administrative hearing of any kind*; and, further, (g) that Respondent repudiated and breached a contract TO employ

and/or TO reemploy-reappoint Petitioner to positions in its public service

Petition 22-62 does NOT claim; allege, or theorize that the Constitution of the United States either guarantees or infers that Respondent must employ or reemploy him in its public service. Neither does Petition 22-62 seek any form of Declaratory Judgment obliging or determining that Respondent MUST NOW or IN THE FUTURE employ or reemploy him. In particular, and because Petitioner claims only the regular *jurisdiction* of the Court of Claims, supra, he does not seek to confer any jurisdiction over any subject matter not included within Title 28, U.S.C.A., Section 1491, and by his allegations thereof (R. 1) incorporated by reference thereto in each of his Counts as stated herein. The Petition discloses on its face that Petitioner knew, claims and carefully alleges his primary rights and their violation and does not request the Court of Claims to determine for him *whether* he has any rights or *what* they might be, even if the Court of Claims had jurisdiction (which it does not have) to determine such matters.

Claiming both the consent of the Respondent to be sued and the jurisdiction of the Court of Claims as the forum (R. 1), Petitioner alleges his date of birth to be January 14, 1911; his graduation from law school 4th in his class with LLB "Cum Laude" in 1936; his membership-in-good-standing at the Bar of Minnesota; the Respondent's established and promulgated "standards" for the positions sought; Petitioner's requisite legal experience "matching" Respondent's "standards"; his honorable discharge as a commissioned officer from World War II military service; his continuous receipt of 10% disability compensation for military service; his former employments by the Respondent in its civil service honorably terminated by reduction-in-force and not by reason of delinquency or misconduct, and his entitlement to and *his requests* for "Veterans' Preference". In particular (R. 32 - 180), Petitioner alleges that from March 23, 1959, through September, 1961, he sought employment and re-

employment by makin careful applications and *requests* to Respondent's National Labor Relations Board (NLRB); its Department of Labor; Veterans Administration; Office of the Solicitor for the Department of Labor; Air Force; its Civil Service Commission; its Department of the Army; and its Department of the Navy and especially requesting the grant of his Veterans' "Preference Eligibility" and his "Reemployment" rights per Section 15 (5, U.S.C.A. Sec. 864) of the Veterans' Preference Act and all the benefits to which he is entitled by reason of his being one of the persons designated in 5, U.S.C.A., Sec. 851. In further particular, although merely summarizing here, Petitioner alleges that he continued to request his preference rights and liberty to compete with other citizens for employment and reemployment in Respondent's classified and unclassified service according to and in compliance with all laws and valid regulations pertaining to such matters. Further Petioner alleges that Respondent's responsible officers debarred and proscribed him from employment, reemployment, and right of liberty to compete with other citizens for same (R. 34-37); (R. 47). And Petitioner alleges that Respondent's NLRB arbitrarily and capriciously made a decision and determined that Petitioner is *not* a "Preference Eligible", not entitled to the benefits, of the Veterans' Preference Act, and *not* one of the persons designated in Section 2 (5, U.S.C.A., Section 851) of the Veterans' Preference Act contrary to the fact and Respondent's own records. (See letters of decision of the Civil Service Commission, Appendix C.). Petitioner further alleges (R. 34-39) that Respondent's NLRB arbitrarily disqualified him from employment, reemployment, and competition for same by its establishment and enforcement of an "age" and "date of graduation from law school" *policy* and because Resdondent's officers informed him that its "policy" preferred to employ and reemploy younger men who had graduated more recently from law school and that Petitioner was "too old", had graduated from law school too long ago, and that he was disqualified on the further

ground that he had not been employed during the years from March 5, 1953, to March, 1959-1960. Petitioner alleges (R. 39-56) that Respondent's arbitrary determination that he is *not* a "Preference Eligible", and *not* entitled to a waiver of his age, and *not* entitled to be reemployed as a former employee "Veteran Preference Eligible", and his disqualification for reason of his unemployment from 1953 to 1960, *illegally*, arbitrarily, and capriciously debarred and proscribed him from employment and reemployment and imposed "pains, punishment, and penalties in the nature of attainder and/or ex post facto law" upon him. Plaintiff further alleges that since Petitioner is in both fact and law a "Preference Eligible", a determination by the Respondent's officers that he is *not* one violates his rights and benefits under the Act; and since such determination was made without granting Petitioner a hearing of any kind, although Petitioner sought to be heard, such determination is violative of his rights and liberties assured by the "due process of law" clause of the 5th Amendment.

Further, Petitioner alleges (R. 39-40) that Respondent's NLRB in October, 1959, employed one Henry L. Scott, a *non preference* person and employed other non-preference persons to positions of Attorney and/or Field Examiner who were not specified by the Congress to be preferred.

Further summarizing, (R. 56-74 Petitioner alleges that he appealed to the Civil Service Commission seeking a right to be heard and to appear for a hearing upon his charges and complaints against the NLRB; that arbitrary and capricious "decision" was made by Respondent's Civil Service Regional Office and a letter of such "decision" was submitted to this Petitioner misconstruing, misapplying, law and regulation, and, since such decision was made without permitting Petitioner to appear and to be heard, same was also an arbitrary and capricious violation of Petitioner's rights and a denial of his liberties. (See letters of "decision" - Civil Service Commission -Appendix C., infra.)

Petitioner (R. 56-75) alleges that it is not a condition precedent to the bringing of this action that he must seek to obtain an "administrative review" of his complaints as to his illegal denial of and debarment from public employment by the NRLB from March 23, 1959, and March, 1960, and (R. 74-75) Petitioner alleges that he made no further attempts to obtain "administrative review" following his receipt of the letter from the Civil Service Commission dated January 5, 1961; and that on December 19, 1961, he dismissed his appellate action already terminated and decided by said Commission without permitting Petitioner to appear and to be heard as alleged therein and that no condition precedent for the commencement of this action remains to be perfomed in any respect.

Petitioner alleges (R. 77-184) his further efforts to obtain employment and reemployment in other agencies and departments of the Respondent, seeking recognition of his "Preference Eligibility", and the continued refusal of the Respondent's officers to recognize him to be a "Preference Eligible" and former employee entitled to be preferred and to permit him to compete with both preference and non-preference eligibles. Additionally, Petitioner alleges that Respondent continued to employ and reemploy non-preference applicants for the positions sought by this Petitioner in various agencies of the Respondent from March 23, 1959, through September, 1961, and thereafter; and that (R. 76-78) Petitioner sustained losses and damages of a sum of money equal to the sums paid or allocated to the persons preferred and employed in preference to this Petitioner who were not entitled to be so preferred.

2. THE PRAYER FOR RELIEF IN THE PETITION:

Petitioner, (R. 184-187), invoked the "discretionary power" of the Court to make certain "declarations" within its regular jurisdiction and "discretion" as to past occurrences- using the past tense of the verb forms. He invokes such non-jurisdictional "power" by citing the

non-jurisdictional statute, 28 U.S.C.A., Section 2201, reminding the Court of Claims of its "power" and making request for "declarations" in addition to monetary damages. (See Appendix A, infra 1a et seq.)

3. RESPONDENT'S MOTION TO DISMISS, FILED FEBRUARY 26, 1962:

Respondent (R. 188) states that it relies upon its brief and Petitioner's verified Petition 22-62, but, without submitting any counter-affidavit attacking the Court's jurisdiction, proceeds to offer two defenses (1) that the Court lacks jurisdiction over the subject matter, *and* (2) that the Petition "fails to state a claim upon which relief can be granted". Further, in support of its two (2) defenses not alternatively set forth, Respondent proceeds to raise *outside matters* not "manifest" within the Petition. (R. 189-192) and particularly that the Petition seeks "Declaratory Judgment and relief" *beyond the court's jurisdiction*. (R. 191). Respondent further asserts as "outside matters" that Petitioner seeks a declaration that Defendant IS obligated to employ him. (R. 189), that Petitioner has selected the wrong forum for his case, that "Plaintiff attempts to charge defendant with a breach of what was *allegedly* a promise to employ him SOLELY BECAUSE HE IS A VETERAN. (R. 191); and further misrepresents material allegations of the Petition (Pet. par. 30(a) at R. 26-27); and Respondent concludes and urges that Petitioner "failed to state BOTH a claim within the *jurisdiction* of the Court *and* a claim upon which relief can be granted."

4. PETITIONER'S MOTION TO STRIKE (R. 193-200) FILED MARCH 28, 1962:

Petitioner objects that his Petition 22-62 was not properly attacked by "Motion To Dismiss"; that no issues were joined or properly raised before the Court of Claims by reason of Respondents' motion; that Respondent's de-

fenses were not permitted to be raised per Court Rule 16 (b); that a "selection" was not made by Respondent as to which defense it would rely upon; and that without selection the two defenses were inconsistent and contradictory inasmuch as Respondent, not having alternatively stated same, is disputing the Court's *jurisdiction* while simultaneously requesting the Court to exercise its claimed "lack of jurisdiction over the subject matter" to determine *issues of law* concerning the statement of "im proper" subject matter. Further Petitioner (R. 197-200) protests that Respondent's "Motion To Dismiss" is "sham and frivolous" for causes stated and particularly that the "Praver For Relief" of Petition 22-62 neither relates to the Court's *jurisdiction* of the subject matter nor to whether the "claim" states a cause of action for remedial relief since such Praver For Relief does not go to the *merits* of the action. Petitioner (R. 200) requests the Court to *dismiss* Respondent's motion.

The two opposing motions were argued before the Court of Claims on June 4, 1962.

5. THE ORDER AND JUDGMENT OF THE COURT GRANTING RESPONDENT'S "MOTION TO DISMISS" AND DISMISSING PETITION 22-62 ENTERED JUNE 22, 1962:

The Order and Judgment of the Court of Claims (R. 203), made and entered without opinion or findings on June 22, 1962 is set forth in Appendix B, infra. Importantly material to the "Statement of this Case" is the Court's *conclusions* stated in such Order and quoted here, viz: " ° ° ° It is concluded that *plaintiff has failed to state a proper cause of action and seeks relief beyond the jurisdiction of this court*".

6. PLAINTIFF'S MOTION FOR RELIEF FROM THE ORDER OF JUNE 22, 1962, DISMISSING PETITION NO. 22-62:

Petitioner, timely, (R. 204), and on July 17, 1962, moved the Court for a rehearing and reconsideration of its

Order and Judgment of June 22, 1962. By such motion (R. 204), Petitioner sought alternative relief, viz: for reconsideration and/or reversal and/or amendment and/or for the Court to reconsider and treat the Respondent's "Motion To Dismiss" of February 21, 1962, to be a "Motion For Summary Judgment" as provided in Court Rule 16 (b)- (See Appendix A, infra.) —and/or to permit Plaintiff to file a cross-motion in alternative form "For Judgment On The Pleadings and/or For Summary Judgment" as provided in Rules 16 and 51 and/or for further relief within the discretion of the Court.

Petitioner (R. 208-245) reminds the Court (R. 209-210) that his petition seeks monetary damages within the regular jurisdiction of the Court conferred by Title 28, U.S.C.A., Section 1491, averring all the facts necessary to state a justiciable cause of action within that Section, claiming its regular jurisdiction and the consent of the Defendant to be sued thereunder, and reminds the Court of its Rule 8 (b) -(See Appendix A, infra) concerning construction of pleadings. In particular, Petitioner cited leading decisions of the Court of Claims wherein the Court had long established the law and rule that actions "founded" upon Acts of Congress are justiciable and proper within its jurisdiction even though the Acts of Congress do not specifically provide that suit may be brought for violation of same. Moreover, Petitioner further reminds (R. 211-212 that the "*subject matters*" of his Petition are *his* claims to certain primary rights and the alleged violations of *those* rights by the Defendant and claims for monetary damages proximately resulting therefrom. Further, he reminds the Court that the Defendant injected "Outside Matters" — matters not manifest in the Petition and not alleged or claimed by Petitioner. In particular (R. 212) Petitioner reminds that Defendant raised "outside matters" by misrepresenting to the Court that Plaintiff was suing to "try title" to a position, seeking to recover "*back salary*", claiming to be a "suspended" employee, and seeking *declaratory judgment* for such things as representing the "*subject matter*" of

the Petition No. 22-62. Petitioner reminds that by reason of Court Rule 8 (b) his Petition must not be construed to claim or allege matters *not claimed* or alleged by Petitioner but rather misrepresented and claimed by Respondent to be the subject matter of Petitioner's verified Petition! Further, Petitioner (R. 213) reminds that nowhere in his Petition (R. 1-184) does Petioner seek affirmative relief in the nature of Declaratory Judgment and that "outside matters" (R. 219-237) concerning the Court's *jurisdiction* and other "outside matters" were *not excluded* by the Court but were included and considered by the Court subsequent to the oral argument on June 4, 1962, when the Court drew its "conclusions" and made its Order dismissing the Petition. Further, (R. 214-217 Petitioner reminds the Court that in his "Prayer For Relief" (supra, herein) and at (R. 184-187) that his citation of 28 U.S.C.A., Section 2201 is only to remind the Court of its "discretionary powers" and is *not* a jurisdictional "claim" in his Petition and in order that the Court might in its "findings" "declare" that Petitioner neither was nor is "too old" and had not graduated from law school too long ago" to be suitable for further Government employment and to make such "declarations" as a part of its judgment for monetary damages. In particular, (R. 215) Petitioner urges that he did not ask the Court to require or direct the Respondent to concur with, accept, adopt, or follow any of the discretionary declarations of the Court. Petioner reminds (R. 216) that under the authority of MARSHALL v. WYNN, 132 F. Supp 169 (1955) it was ruled that Title 28, U.S.C.A. Section 2201 does not give federal courts *jurisdiction* over any controversy that would not be within their jurisdiction if affirmative relief were sought, but merely gives the Court POWER to determine rights of a Petitioner for such a judgment in any actual controversy wherein the court *otherwise* has jurisdiction of "subject matter" even though the case has *not developed* to a point where affirmative relief can be given. Petitioner reminds at (R. 217) that the Defendant has confused "subject

matter" of a Petition with an "object" of the Petition, such as "remedial relief", and has confused the Court thereby. Petitioner further reminds (R. 217) that if the Court "lacks jurisdiction over the subject matter" of Petition 22-62, then it "lacks jurisdiction" for any purpose; and that it has no jurisdiction to determine or conclude, as it has, that Plaintiff has failed to "state a proper cause of action! Petioner cites at (R. 244) the ruling of the United States Supreme Court in Bell v. Hood, 327 U. S. 678; 66 S. Ct. 773, at pp. 775-776 wherein this Court has ruled that a decision that Plaintiff has failed to state a cause of action is a decision on a *matter of law* that must be decided *after* and *not before* the Court has assumed jurisdiction. Concluding this statement as to the material facts presented for review herein, Petitioner, (R. 239) lists and indicates five (5) *errors* basic to the issues raised herein.

REASONS FOR GRANTING THE WRIT

There are several compelling and important reasons why a review on writ of certiorari should be granted in this case.

1. This case presents questions far beyond the episodic and whose resolution will have immediate importance far beyond the particular facts involving this Petitioner tremendiuonsly important principles, upon which are based not only the rights, hopes, an aspirations of thousands of war veterans, past, present, and future who claim ~~and future who claim~~ and apply for the benefits of the Veterans' Preference Act. . . . but which concern the constitutional rights and immunities of every citizen in the United States and whether their claims for monetary damages for the invasion of such rights are "justiciable" and proper causes of action within the jurisdiction of the United States Court of Claims

2. The Court has mistaken and confused an appropriate pleading claiming its regular jurisdiction per 28 U.S.C.A., Section 1491 (essential to invoking the Court's

jurisdiction) with a request in its "Prayer For Relief" for the exercise by the Court of its "discretionary power" to grant discretionary remedial relief which is a non-jurisdictional matter. It has been well settled that 28 U.S.C.A. Section 2201 does not confer jurisdiction where none otherwise exists, Stafford v. Superior Court of California In and For Los Angeles County, C.A. Cal., 1959, 272 Fed. 2nd. 407. "This section enlarged range of remedies available in federal courts but did not alter, or in any way modify, their jurisdiction", American Air Lines Inc. v. Louisville and Jefferson County Air Bd., C.A. Ky 1959, 269 Fed. 2nd 811.

3. The dismissal of this Petition on the Defendant's "Motion To Dismiss", (actually a "Motion For Summary Judgment"); the necessary assumption by the Court that the facts pleaded in the Petition must be taken to be true as facts, same not having been denied by Respondent; failure of the Court to require Respondent to raise objection to its jurisdiction by counter-affidavit (the Petition being a verified Petition); failure of the Court to exclude several "outside matters" (matters not manifest in the Petition) raised by Respondent on its "Motion To Dismiss" but without counter-affidavit; the apparent concurrence by the Court with Respondent's contention that Petitioner's request for the Court's exercise of its "discretionary power" in his "Prayer For Relief" constitutes either (1) a claim or allegation of a primary right and "subject matter" *beyond the Court's regular jurisdiction*, or (2) either ousts the Court from its regular jurisdiction or is at variance with Petitioner's claim to the Court's regular jurisdiction (R. 1); the Court's conclusions that a subject matter of the Petition (not identified) is "beyond its jurisdiction"; and the Court's decision on the issues of law (merit) that Petition fails to state a proper cause of action, although necessarily assuming the undenied facts to be true, and while apparently considering that it had no jurisdiction over some part of the subject matter of the same claims — all represent such a substantial departure from the accepted and usual course of judicial pro-

ceedings as to call for a prompt exercise of the Supreme Court's power of supervision.

4. The decision of the Court of Claims, insofar as it has ruled to be not justiciable and not proper causes of action alleged to be founded upon and claiming violations of an Act of Congress *and* Regulations of an executive department *and* of Contract (undisputed as to the facts by Respondent) is *contrary* to the settled law as to the justiciability of such causes of action both in the Court of Claims and this Court as well. Therefore, the Court has made decision not in accordance with its own applicable decisions and those of this Court as well.

Although never before has the Supreme Court passed directly on the justiciability of a claim for monetary damages brought against the United States by a citizen for alleged violation of Article 1, Section 9, Clause 3 of the Constitution or for deprivation of a "liberty" without due process of law in violation of the 5th Amendment, this Court has ruled that such causes of action are justiciable and merit judicial relief. Analogously, this Court granted certiorari in the case of Joint Anti-Fascist Refugee Committee v. McGrath, Atty Gen. et al, (1951), 341 U.S. 123; 71 S. Ct. 624, to review the dismissal of a complaint that concerned invasion of Petitioner's constitutional rights by the Executive Branch of the Government. Although that action was one for injunctive relief and not monetary damages, whereas the case at bar is one for monetary damages, this Court ruled that a cause of action for the invasion of constitutional rights and without a hearing of any kind *is justiciable* and states a proper cause of action. Id., this Court expressed its opinion on many of the same issues concerned in the case at bar and particularly this Petioner's right to be free from arbitrary "blacklisting" by the Executive Branch, a form of attainder. Notably, Mr. Justice Jackson, at page 655 of that case stated, "The fact that one may *not have* a legal right to get or keep a government post does *not mean* that he can be adjudged *ineligible illegally*, citing Perkins v. Elg, 307 U.S. 325; 59 S. Ct. 884,896." (Empahsis and italics sup-

plied.) In the case of Perkins v. Elg, mandamus issued against the Secretary of State, this Court saying, "The Secretary might say she would get no passport, but he could not for *unjustifiable reasons* say she was *ineligible* for one". Furthermore, this Court issued Certiorari and ruled that illegal denial of employment and opportunity for employment is an imposition of "pains, penalties, and punishment in the nature of attainder" —United States v. Lovett (1946), 328 U.S. 303; 66 S. Ct. 1073. See also Ex parte Garland, 4 Wall. 333, 18 Law Ed. 366; and Cummings v. State of Missouri, 4 Wall. 277, 323. Further this Court has ruled that right to seek and compete for public employment is entitled to the protection of the 5th Amendment of the Constitution, Wieman v. Updegraff, 344 U.S. 183; 76 S. Ct. 215; Slochower v. Board of Higher Education, 350 U.S. 551; 76 S. Ct. 637; Cramp v. Board of Public Instruction (1961), 368 U.S. 278, 281; 82 S. Ct. 275. In Schware v. Board of Bar Examiners of the State of New Mexico, 77 S. Ct. 752 (1957), this Court said, "A state cannot exclude a person from the practice of law or from any other occupation in a manner or *for reasons* that contravene 'Due process of law' ° ° ° Id., at page 776, this Court said, "A state can require high standards of qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualifications must have a rational connection with the applicants fitness or capacity to practice law*". Id., Mr. Justice Frankfurter, concurring, stated, " ° ° Refusal to allow a man to qualify himself for the professions on a wholly arbitrary standard or on a consideration that offends the dictates of reason *offends the due process clause*". (Emphasis and italics supplied.)

This Court granted certiorari in Elder et al v. Brannan, Secy of Agriculture, (1950), 341 U.S. 277; 71 S. Ct. 685, a case *analogous* to the case at bar as to the justiciability of Petitioner's claims for "Preference Eligibility" for reemployment as a former employee. In that case, Mr. Justice Clark writing for the Court, at pp. 687-688, stated, *we granted certiorari* because of the obvious impact of

these cases on federal employment policies". Id., p. 690, Mr. Justice Clark referred to 5, U.S.C.A. Sec. 864, (a basic claim of this Petitioner in the case at bar), observing that Elder, a former employee and "Preference Eligible", has mandatory rights to be preferred and his requests for such preference must be processed according to that statute.

This Court granted *certiorari* in Bell v. Hood, (1946), 327 U.S. 678; 66 S. Ct. 773. Mr. Justice Black, writing for the Court at pages 775, stated, "*We granted Certiorari because of the importance of the jurisdictional issues involved.* At pp. 776-777, "The issue of law whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the 4th and 5th Amendments, *That question has never been specifically decided by this Court.* That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for the purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of a right to vote in violation of the Constitution". Further quoting Mr. Justice Black in that case, pp. 775-776, " ° ° Before deciding that *there is no jurisdiction ° ° the Court must look to the way the complaint is drawn* to see if it is drawn so as to claim a right to recover under the Constitution and the laws of the United States. For to that extent the party who brings a suit is the master to decide what law he will rely upon, and does determine whether he will bring a 'suit arising under the ° ° Constitution or laws of the United States by his declaration or bill' The Fair v. Kohler Die and Speciality Co., 228 U.S. 22,25 33 S. Ct. 410, 411. " ° ° ° Jurisdiction, therefore, is not defeated, as respondent seems to contend, by the possibility that the averment might *fail to state a cause of action* on which Petitioners could actually recover *For it is well settled that the failure to state a proper cause of of action calls* for a judgment on the *merits* and *not* for dismissal for want of jurisdiction. Whether the Complaint

states a cause of action *is a question of law,* and just as issues of fact it *Must be* decided *after* and *not before* the Court has assumed jurisdiction over the controversy". (Italics and emphasis added.)

In Larson v. Domestic and foreign Corporation (1949), 327 U.S. 682; 69 S. Ct. 1457, at p. 1464, this Court ruled, "We hold that if actions of an officer do not conflict with the terms of his valid statutory authority, then they are the action of the sovereign * * * if they would be regarded as the actions of a private principle under the normal rules of agency".

Therefore, on the face of this Record, and by the reason of this Court's ruling in Bell v. Hood, supra, the Court of Claims has ruled on issues of law (the merits) concerning the justiciability of the causes of action. Therefore, having ruled that such causes of action are *not proper,* it seems that technically the Court took jurisdiction over the subject matter of the Petition 22-62, perhaps without intending to do so, and by reason of this Court's ruling in Bell v. Hood, supra. Nevertheless, it also appears that the Court of Claims, either BEFORE or AFTER taking jurisdiction over the subject matters repudiated its regular jurisdiction either partially or totally by failing to recognize that Title 28, U.S.C.A., Section 2201, cited only in the "Prayer For Relief", does not relate to *any jurisdictional* matter but merely authorizes "discretionary powers" to be exercised in cases already within its regular *jurisdiction* by reason of an *appropriate pleading.*

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Harry H. Drill,
Attorney Pro Se
For Petitioner.

Dated December....., 1962.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States

Article I, Section 9, Clause 3

No Bill of Attainder or ex post facto Law shall be passed.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 28 UNITED STATES CODE ANNOTATED

Judiciary and Judicial Procedure, Secs. 1491-1650

Sec. 1491. Claims against the United States generally; actions involving Tennessee Valley Authority.

The Court of Claims shall have jurisdiction to render a judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority

Act of 1933, as amended, with respect to suits by or against the Authority.

Title 28 U.S.C.A. Chapter 21. Definitions:

Sec. 451.

As used in this title: The term "Court of the United States" includes * * * the Court of Claims * * * and any Court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Title 28 U.S.C.A. Chapter 151. Declaratory Judgments

Sec. 2201. Creation of Remedy:

In a case of actual controversy *within its jurisdiction*, except with respect to Federal Taxes *any court of the United States*, upon the filing of an *appropiate pleading*, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief *is* or *could be sought*. Any such declaration shall have the force and effect of a final judgement or decree and shall be reviewable as such. (Italics and Emphasis supplied.)

TITLE 5 UNITED STATES CODE ANNOTATED

Executive Departments and Government Officers and Employees

Chapter 17. — Preference of Veterans In Government Employment

Sec. 851. Persons entitled to federal employment preferences.

In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service,

(c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and who have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or Department of the Air Force or the Navy Department. * * *

SEC. 854. Waiver of physical and educational qualifications.

In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given. No minimum educational requirement will be prescribed in any civil-service examination except for such scientific, technical, or professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reason for such decision.

Sec. 858. Unclassified civil service; selection from qualified applicants.

In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of Section 851, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this chapter.

Sec. 860. Rules and regulations by Civil Service Commision

The Civil Service Commissions is hereby authorized to promulgate appropriate rules and regulation for the administration and enforcement of the provisions of this chapter.

Sec. 864. Separated or furloughed eligibles as entitled to reclassification and reappointment.

Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, *upon request*, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in Section 856 of this title, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in Section 856 and 857 of this title. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled. (Emphasis and italics supplied.)

Sec. 868. Enforcement of rules and regulations by Commision

It shall be the authority and DUTY of the Civil Service

Commission in all cases under the classified civil service to make and enforce *appropriate* rules and regulations to carry into full effect the provisions, intent, and purpose of this chapter and such Executive orders as may be issued pursuant thereto and in furtherance thereof: *Provided*, that any recommendation by the Civil Service Commission, submitted to any Federal Agency, on the basis of the appeal of any *Preference Eligible*, employee or FORMER EMPLOYEE, shall be complied with by such agency. (Emphasis and italics supplied.)

TITLE 5, UNITED STATES CODE ANNOTATED

Chapter 12. — Civil Service Commission and Classified Civil Service

Sec. 638b. Age limitaion on appointment to competitive service; appropriations.

No part of any appropriation in an Act on or after June 27, 1956 shall be used to pay the compensation of any officer or employees who establish a requirement of maximum age for entrance into positions in the competitive civil service, *provided*, that no person who has reached his seventieth birthday shall be appointed in the competitive civil service on other than a temporary basis.

RULES OF THE UNITED STATES COURT OF CLAIMS

Revised December 2, 1957

Rule 8. General Rules of Pleading.

(a) Pleading To Be Concise and Direct. Consistency. (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading

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1 Definition of "Pleadings", (Rule 6), does not include "Motions", but "Motions" are separately defined and considered in Rule 7, neither of which Rules are set forth herein as necessary.

or motions are required. (2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(b) Construction of Pleadings: All pleadings shall be so construed as to do substantial justice.

Rule 16. Defenses and Objections: When and How Presented.

(a) * * * * *

(b) How Presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, or third-party petition, *shall be asserted in the responsive pleading thereto if one is required*, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A *motion* making *either* of these defenses shall be filed within 30 days after service of the PLEADING to which the motion is directed and shall be filed before further pleading if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (2) to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading*

are presented to and *not excluded* by the Court, the motion shall be treated as one for *summary judgment* and disposed of as provided in Rule 51, *and all parties shall be given reasonable opportunity to present all material pertinent to such motion by Rule 51.* (Emphasis and italics supplied)

Rule 50. Judgment. Definition: "Judgment" as used in these rules includes any decree or order subject to a petition for writ of certiorari.

Rule 51. Summary Judgments.

(a) For Claimant. A party seeking to recover upon a claim or counterclaim may, at any time (except as provided in subdivision (c) below) after a responsive pleading has been filed (including the service of a motion for summary judgment by the adverse party) move with or without supporting affidavits for a summary judgent in his favor upon all or any part thereof. (Emphasis supplied.)

(b) For Defending Party. A party against whom a claim or counterclaim is asserted may, at any time (except as provided in subdivision (c) below), move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Leave Required When. A motion for summary judgment may not be filed, except by leave of the Court, after (i) the taking of evidence has begun or (ii) the filing of a stipulation of the parties or a pretrial memorandum containing all of the material facts.

(d) Motion and Proceedings Thereon. After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7 (b) for filing a response thereto such motion shall be assigned to the calendar, as provided in Rule 47 (b). The judgment sought shall be rendered if the pleadings, depositions, and admissions on fi-

le, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) . . . . . .
(f) . . . . . .
(g) . . . . . .
(h) . . . . . .

APPENDIX B

ORDERS AND JUDGMENTS BELOW IN THE UNITED STATES COURT OF CLAIMS

No. 22-62

HARRY H. DRILL

v.

THE UNITED STATES

O R D E R

This case comes before the court on defendant's motion to dismiss plaintiff's petition. Upon consideration thereof, together with the opposition thereto and the briefs and oral argument of the parties, it is concluded that plaintiff has failed to state a proper cause of action and seeks relief beyond the jurisdiction of this court, and.

IT IS ORDERED that defendant's motion to dismiss be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT,

JUN 22 1962

Marvin Jones,
Chief Judge.

O R D E R

These cases come before the court on motions for rehearings, consideration, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this third day of October, 1962, that said motions be and the same are overruled as follows:

22-62 Harry H. Drill. Plaintiff's motion.

BY THE COURT,
Marvin Jones,
Chief Judge.

APPENDIX C

ADMINISTRATIVE DECISIONS

ADDRESS:
The Director
Eighth U.S. Civil Service Region
1114 Commerce Street,
Dallas 2, Tex.

IN YOUR REPLY REFER TO FILE R8X:MB:wd AND DATE OF THIS LETTER

UNITED STATES CIVIL SERVICE COMMISSION

EIGHTH UNITED STATES CIVIL SERVICE REGION

comprising Texas, Oklahoma, Louisiana, and Arkansas

OFFICE OF THE DIRCTOR, DALLAS 2, TEX.

Aug. 10, 1960

Mr. Harry H. Drill
2049 Columbia
Houston 8, Texas
Dear Mr. Drill:

This refers to my letter of June 30, 1960, file R8X:MB:wd, and to your letters of May 27, June 3, June 17, July 7, and August 2, 1960, regarding your request for relief from decisions of the National Labor Relations Board not to appoint you to a position of Attorney GS-7 or Field Examiner GS-7 in its Houston, Texas Office.

We must treat your request in two parts as one of the positions — that of Attorney GS-7 — is an excepted position and the other — that of Field Examiner GS-7 is in the competitive Civil Service. Many of the ground rules are different for the two positions; we shall try to bring these differences out in the discussion that follows.

We have no basis interceding in your behalf with the NLRB insofar as your failure to receive an appointment

to an Attorney GS-7 position. As you may know, Attorney positions were placed in the excepted service May 1, 1947, by Executive Order. This followed the action of Congress, first expressed in the Commission's Appropriation Act for 1945, which prohibited the expenditure of any money for the examination of candidates for Attorney positions requiring admission to the bar. This prohibition has been continued each year since and is still in effect. Thus, we have no basis for rating you for the Attorney position you seek; we are prohibited from doing so.

Section 11 of the Veterans Preference Act of 1944, as amended, simply authorizes the Commission to issue appropriate rules and regulations for the administration and enforcement of the Act. For excepted positions, the Commission's instructions are stated in Part 21 of its regulations. In substance, the burden is placed on the head of the agency for observing and complying with the Act in filling his excepted positions. If in your case he had found you eligible for the Attorney position, he would have necessarily granted you the preference points to which you are entitled (these are not accorded under the Act unless you are first determined to be qualified.) He would then have had to record his reasons for passing over you to select a lower ranking non-veteran. Reasons for passing over a preference eligible and selecting a lower-ranking non-veteran for an excepted position are not submitted to the Civil Service Commission for review.

The Director of Personnel for the agency recently stated the reasons for your ineligible rating for the Attorney GS-7 position. His reasons were the same as those stated in the agency's letter of May 2, 1960, to Congressman John D. Dingle, a copy of which you have. We can only suggest that you further pursue the matter of your qualifications for an Attorney GS-7 position with the National Labor Relations Board if you so desire. That agency has the final administrative authority to determine your qualifications for the Attorney position.

The agency has advised us that you were rated ineligible for the Field Examiner GS-7 position for the same reasons that you were rated ineligible for the Attorney position. We have made a careful analysis of your application for Field Examiner GS-7 (the official title of the position is Labor Management Relations Examiner, GS-1810-7). It is our conclusion that you meet the experience and training requirements for this position, and we have instructed the Director of Personnel to add your name in proper position as a tentative eligible in his applicant supply file for appropriate consideration for any Field Examiner vacancy that may occur. You can expect to be given a written test before being found finally eligible. We have also ascertained that no non-veteran has been employed in the Houston, Texas Office of the agency in a Field Examiner GS-7 position since you applied in March 1959. It is our conclusion that you have not missed opportunity for appointment to a Field Examiner position and that our instruction to the agency will secure you proper consideration for any vacancy that may occur in the future.

For your further information, [2] the Commission has no authority to direct an agency head to select any person for employment in enforcing the provisions of the Veterans Preference Act. The Commission can only deny the appointment of a person who cannot be appointed legally. Even if the agency had appointed a non-veteran to a Field Examiner position in Houston after you applied for it, we could only order the separation of the non-veteran because of failure to observe the provisions of the Veterans Preference Act. We would permit retention of the non-veteran only if the preference eligible improperly passed over is appointed. In the event we should find that an agency had erroneously passed over a qualified preference eligible and selected a non-veteran, for an excepted position without recording the reasons for passing over the veteran, we would call the matter to the attention of the agency for proper compliance

with the provisions of the Commission's regulations and the Veterans Preference Act.

You apparently believe that you have a right to appeal for relief in this matter under the provisions of Section 14 of the Veteran Preference Act. Section 14 protection is available only in the case of certain adverse actions (discharges, suspensions for more than 30 days, furloughs without pay, reductions in rank or compensation, or debarment from future employment) and only to preference eligibles who are serving in competitive positions under temporary appointments and who have completed a probationary or trial period or who are serving in excepted positions and have completed more than one year of current continuous service in the same line of work. You are not currently employed in either a competitive or excepted position and none of the adverse actions mentioned in Section 14 have ocurred in your case. You have not been debarred from future employment by the National Labor Relations Board or by the Civil Service Commission. [3]

You are correct in your understanding that your reinstatement to a position in the competitive service would be a privilege and not a right. [4] The reinstatement of a former career employee to a position in the Competitive Civil Service is always at the discretion of an appointing officer.

Sincerely,
W. V. Gill
Regional Director

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1 This letter is the decision and disposal of the formal "Petition-in-Appeal" submitted to the Eighth United States Civil Service Region together with sworn affidavits, letters, and other supporting material by Petitioner under his convering letter of May 27, 1960, whereby Petitioner sought and requested the right to appear and to be heard upon his charges of adverse action committed by Respondent's NLRB and as alleged R. 56-57. (Petioner has alleged this "decision" to be arbitrary and capricious and made without a "hearing" of any kind — See R. 63-69.)

2 These statements of "information" are alleged to be arbitrary inasmuch as they are contrary to the **proviso** of Section 19 of the Veterans' Preference Act of 1944, as amended, 5 U.S.C.A. Section 868. (See R. 63); further alleged to be arbitrary and capricious for other detailed reason. R. 67-69.

3 Petitioner has alleged (R. 63-69) that the above administrative decision is violative of Article 1, Section 9, Clause 3 and or the 5th Amendment of the United States Constitution; further violative of the Veterans' Preference Act, 5, U.S.C.A. Section 851; 853; 854; 856 through 860; 862 through 864, and 868, that the decision affirmed, confirmed, and continued the debarment and proscription of Plaintiff from Defendant's public employ, imposed "pains and penalties upon Plaintiff in the nature of attainder"; substituted the "Will" of the Defendant and its Regional Director as and for "judgment"; was made without permitting Petitioner to appear and to be heard; and was arbitrary and capricious for other detailed and alleged causes.

4 The Regional Director's distinction between a "right" and "privilege" and unlawful claim to "discretion" in this paragraph is alleged to be violative of Petitioner's "rights" to the benefits of 5, U.S.C.A. Section 864 requested by Petitioner and alleged to be "non-discretionary" (R. 32-39) Further, Petitioner has alleged in detail (R. 46-56) the reasons why this "decision" is arbitrary, capricious, and discriminatory and aided the Defendant to continue to debar and deprive Petitioner from employment and opportunity to seek employment illegally.

Sections 11 and 14 of the V.P. Act mentioned in this "decision" are respectively Sections 860 and 863 of 5, U.S.C.A.

In Reply please refer to

BAR: JOH:lj

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON 25, D. C.

January 5, 1961

Mr. Harry H. Drill,
2049 Columbia
Houston 8, Texas

Dear Mr. Drill:

This refers to your appeal from the decision of the Eighth U.S. Civil Service Region that the National Labor Relations Board had the final authority to determine your qualifications for a GS-7 Attorney position; that Section 14 protection is not available in connection with adverse decisions on applications for employment; and that you were not debarred from future employment by either the National Labor Relations Board or the Civil Service Commission.

The Board of Appeals and Review has carefull considered the entire appellate record in the case including all submissions by you and the agency.

The Eighth Regional Office found that it had no basis for rating you for the attorney position you seek since the Commission is prohibited from doing so by legislation enacted by the Congress of the United States. The Board concurs in this finding of the Regional Office.

You allege that Section 2 of the Veterans' Preference Act of 1944, as amended, makes any honorably discharged veteran of wartime service who has established the present existence of a service-connected disability a preference eligible. You then argue that since Section 2 of the Act makes you a preference eligible, Section 5 of that Act requires a waiver of all age limits in your case, but that the National Labor Relations Board has failed

to comply with Section 5 by pursuing a policy of hiring *young* attorneys recently out of law school, an adverse action which "debars" you from future appointment.

We find no support for your allegation that the National Labor Relations Board has violated Section 5 of the Veterans' Preference Act in your case. On the other hand, the record establishes that the ineligible rating for the attorney, GS-7 position resulted from the fact that you lacked recent and up-to-date experience in that you had not been employed for the past 7 years, coupled with the evaluation of two National Labor Relations Board officials by whom you were interviewed that your personality was not suited to representing a government agency in legal and investigatotry matters.

You observe that Section 11 of the Veterans' Preference Act authorizes the Commission to promulgate rules to enforce all provisions of the Act including Section 5 and argue that delegation by the Commission to the agencies of authority to enforce rules and regulation pertaining to excepted positions does not relieve the Commission of responsibility of providing neccessary rules and regulations to enforce Section 5 for the benefit of applicants.

As noted by the Eighth Regional Office in its letter to you dated August 10, 1960, Section 11 of the Veterans' Preference Act, as amended, simply authorizes the Commission to issue appropriate rules and regulations for the administration and enforcement of the Act. Under that authority the Commission has issued instructions covering the procedures to be followed in filling excepted appointments which are published in the Federal Personnel Manual, Chapter A-7.

You state that Section 9 of the Veterans' Preference Act requires agencies to make selections for the excepted service in accordance with the provisions of the Act. You argue that, contrary to the Commission interpretation that a veteran must meet the minimum entrance requirements before he can become a preference eligible, Section 5 presupposes only that a veteran must qualify

under Section 2 in order to become eligible to take an examination, and therefore a preference eligible's age must be waived, and if age was not waived your application was never properly considered under Sections 5 and 9 of the Act.

Section 9, to which you make reference, requires that the nominating or appointing officer or employing official "shall make selection from the *qualified* applicants. . . . " The National Labor Relations Board found you not qualified for that position of Attorney, GS-7, hence you were not a preference eligible within the meaning of Section 2 of the Act and Sections 5 and 9 had no application in your case.

You argue that the proviso in Section 19 of the Veterans' Preference Act does not limit the effect of that Section to the competitive service when it comes to appeals by preference eligibles; that it is also the duty of the Commission to make and enforce rules and regulations relative to preference for veterans in excepted positions.

Under the authority of Section 19 of the Veterans' Preference Act, as amended, the Commission has issued regulations covering the procedures to be followed by agencies and department in taking adverse action against preference eligibles. Such regulations appear in the Federal Personnel Manual under Part 22, Z1-301 through Z1-306. These regulations apply to preference eligibles in the excepted service as well as those in the competitive service.

You contend that since Part 21 of the Commission's Regulations does not have provision for enforcement through appellate procedures, you consider Part 22 was issued for the enforcement of all provisions of the Act including provisions pertaining to excepted positions, but if Part 22 is not applicable, resort must be had to other rules that have been made or which should be made.

Actually, of course, Section 21.10 of Part 21 does provide for appeals from removals, suspensions, furloughs, or demotions of preference *employees*. Since you were not an employee when the National Labor Relation Board

rated you ineligible for the position of Attorney, GS-7 you were not entitled to the appeal rights afforded by Section 21.10 of the Regulations of the Commission. Part 22 is for special application to actions arising under Section 14 of the Veterans' Preference Act.

You argue that Rule V, Section 05.1 et seq., directs the Commission to "promulgate and enforce such regulations as may be necessary to carry out the provisions of . . . . . the Veterans' Preference Act . . . . . " and that it also provides that the Commission may grant variations from the strict letter of the regulations "whenever there shall be practical difficulties and unnecessary hardships in complying . . . . " It follows, you argue, that the Commission must already have issued regulations to hear and act on charges that the Veterans' Preference Act has been violated; that Rule V does not exclude positions or limit appeal of adverse decisions to employees; that while Rule V, Section 05.2 specifically mentions that the Commission may investigate qualifications and suitability of applicants for positions in the competitive service, the language used does not exclude the excepted service.

As indicated in the discussion heretofore, you have failed to demonstrate any probability that the Veterans Preference Act has been violated in your case. In the absence of a reasonable showing, supported by material fact, your mere assertion of your belief that a violation has occurred does not afford sufficient cause for the Commission to subscribe to your belief which is apparently unfounded on the facts. 4

As a result of its consideration of your case, the Board has determined that the Eighth U.S. Civil Service Region correctly interpreted the applicable provisions of law, rules, and regulations to your application for the excepted position of Attorney GS-7, and that its decision in the letter of August 10, 1960, should be and is, therefore, affirmed.

With reference to the list of instruments in the file, the Board confirms the presence of those instruments listed

on the check list submitted with your letter of August 31, 1960.

For the Commissioners:

Sincerely yours,
John E. Blann, Chairman
Board of Appeals and Review

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1 The "findings" and "record" referred to in this paragraph of the "decision" are alleged in detail to be arbitrary, capricious, and not "administrative judgment" but a substitution of "Will" contrary to fact and in violation of law — (R. 42-56).

2 Petitioner, (R. 49), has alleged that certain regulations referred to in this paragraph are wholly void because violative of the V.P. Act; that if the President expressly authorized and/or approved the indicated regulations (R. 50), then Defendant's actions and applications of such regulations proscribed Plaintiff from Defendant's public employ in Plaintiff's chosen profession, deprived him of his liberty to sell his services to Defendant, and/or to execute contracts OF employment with Defendant without due process of law in violation of the 5th Amendment, and imposed "pains, penalties, and punishment upon Plaintiff in the nature of Attainder and Ex Post Facto Law in violation of Article 1, Sec. 9, Cl. 3 of the Constitution. Petitioner, (R. 47), singled out the sub-sections of Regulation, Part 21 alleged to be void at R. 49.

3 Petitioner has alleged (R. 47) that Defendant's NLRB arbitrarily determined him to be **"not** a preference eligible" and that Defendant's agencies assert and pretend that it has a discretionary right to determine Petitioner to not be a "Preference Eligible" contrary to the fact thereof (R. 22) and the provisions of law 5 U.S.C.A. Section 851, (R-21), and as further alleged (R. 1-22); this paragraph of the Commission's Board of Appeals and Review letter confirms the NLRB determination that Petitioner, **not being qualified for the**

position of Attorney, was therefor "not a preference eligible veteran" entitled to the benefits of Section 5 (5, U.S.C.A. Section 854) or Section 9 (5, U.S.C.A. Section 858), and Petitioner has alleged such "decision" to be arbitrary and capricious and violative of the Veterans' Preference Act and the Constitution and for the reasons alleged in detail (R. 66-74).

4 The "mere assertions" referred to in this paragraph are alleged (R. 73) to be the sworn affidavits and offers to make proofs submitted to the Civil Service Commission in effort to induce the Commission to permit Petioner to appear and to be heard; that the Commission considered same to be not of sufficient probative value compared to unsworn statements of Defendant's NLRB officials to "trouble the Board" with a personal hearing; and that such decision was arbitrary and capricious for the causes and as alleged (R. 73-74).

NOTE Petitioner has further alleged, (R. 56-57) that it is **not a condition precedent** to the institution of these causes of action for monetary damages to either seek or to obtain an "administrative hearing" before Respondent's Civil Service Commission, the NLRB, or before any other administrative body. Further, Petitioner has alleged, (R. 74-75) that on December 19, 1961, he dismissed his "Petition-in-Appeal" already and previously determined by the CSC Board of Appeals and Review 11 months prior to such dismissal and by its letter of January 5, 19[illegible] set forth above. Further, Petitioner has alleged (R. 75-184) his further efforts to obtain employment, reemployment, and or his rights to compete with others for Respondent's employment opportunities and or his rights and benefits of the Veterans' Preference Act **both prior and subsequent** to his abortive efforts with the NLRB and and the Civil Service Commission. As disclosed by (R. 1-184) Petitioner made no other attempt to obtain the intercession of the Defendant's Civil Service Commission as to subsequent and continued violations of his alleged rights by the Respondent's nominating and appointing officers in its Department of Labor or Air Force, or Veterans' Administration, or